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No. -

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MERYL SUE BAKER,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May an agency deny an individual the protections of the Privacy Act, which prohibit agencies from maintaining and using personal records in an unfair manner, simply by placing the offending records in a file that does not bear the individual's name or other personal identifier?

PARTIES TO THE PROCEEDING

Petitioner seeks review of a decision of the United States Court of Appeals for the Ninth Circuit. The petitioner, Meryl Sue Baker, was the plaintiff in the lawsuit brought in the United States District Court for the Southern District of California, and the appellant in the court of appeals. The respondent, the United States Department of the Navy, was the defendant in the district court and the appellee in the court of appeals.

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DEPARTMENT OF THE NAVY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 814 F.2d 1381 (1987) and is reproduced in the Appendix ("App.") at pages 1a -11a. The order of the United States District Court for the Southern District of California is not reported and is reproduced at App. 13a-14a.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1987. The opinion of the court of appeals was entered on April 14, 1987. By order dated July 1, 1987, Justice O'Connor extended the time for filing this petition to and including August 17, 1987. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(l).

STATUTE INVOLVED

The pertinent provisions of the Privacy Act, 5 U.S.C. § 552a (1982), are set out at App. 15a-18a.

STATEMENT OF THE CASE

This case presents an important question regarding the scope of the Privacy Act, a statute which this Court has not previously reviewed. The Act embodies Congress' determination that "each individual should have the right to discover if he is the subject of a government file, to be granted access to it, to be able to ensure the accuracy of it, and to determine whether the file has been abused by improper disclosure." S. Rep. No. 1103, 93d Cong., 2d. Sess. 20 (1974). In order to effectuate these goals, the Act imposes a number of duties on agencies that maintain "systems of records" regarding individuals. Among these are the obligation to correct erroneous records, to make decisions about individuals only on the basis of accurate and timely records, and to refrain from maintaining records which reflect the exercise of First Amendment activities. The Act specifically grants individuals who are injured by violations of these requirements the right to obtain injunctive and monetary relief in appropriate circumstances. This case raises the issue of whether a federal

agency can avoid all of the requirements and remedies of the Privacy Act simply by physically locating damaging records about an individual someplace other than the individual's own file.

The petitioner in this case, Meryl Sue Baker, is a civilian employee of the respondent Department of the Navy, where she works as a Supervisory Personnel Research Psychologist. In February 1985, one of petitioner's subordinates filed an administrative grievance which made serious charges against her, including that she had systematically harassed and abused him, that she had intentionally given him a biased and misleading performance review, and that she had fabricated evidence in an effort to have him dismissed from his job. On April 12, 1985, the Navy took the highly unusual step of appointing an officer, Lt. Kenneth Davis, to investigate the charges against petitioner.

At the end of his two-month investigation, which included interviews with petitioner and her co-workers, subordinates, and supervisors, Lt. Davis submitted a twenty-page report to petitioner's superiors. The report contains detailed descriptions of eighteen charges against petitioner, as well as specific findings that most of the charges were factually supportable. In effect, the report found that petitioner had systematically abused her supervisory powers by consistently harassing, threatening, and tormenting her subordinates, even to the point of "strip-p[ing] them of self-respect." Immediately following the preparation of this report, petitioner was demoted from a supervisory to a nonsupervisory position, was given a marginal performance rating after having received outstanding ratings for the three prior years, and was sent an extremely critical letter of reprimand regarding her treatment of subordinates.

Petitioner responded to these adverse actions in two ways. First, she filed her own administrative grievance, charging that the Navy's actions constituted illegal sex discrimination and retaliation by her male superiors. Second, she sought administrative relief under the Privacy Act, initially by requesting a copy of the Davis report, and subsequently by seeking to correct inaccuracies in it.

In response to petitioner's charge of discrimination and retaliation, the Navy totally reversed its prior position, and agreed to rescind its letter of reprimand, restore petitioner to her supervisory position, and change her performance rating from marginal to outstanding. However, in response to her efforts to obtain and correct the document that formed the basis for these adverse actions, the Navy told petitioner that she was not entitled to any relief under the Privacy Act. The sole rationale that the Navy offered was that it had not put the Davis report in petitioner's personnel file, but instead had placed it in the file of the subordinate who had pressed the charges against her. Subsequently, petitioner obtained most of the report under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), but that law does not give individuals a right to amend erroneous records or to seek any other relief for an agency's improper use of its records.

On October 28, 1985, therefore, petitioner filed a Privacy Act complaint, *pro se,* in the United States District Court for the Southern District of California. As provided for in the Act, she requested amendment of the Davis Report, an injunction prohibiting the Navy from disseminating it, and compensatory damages for injuries that she suffered as a result of the report's preparation and dissemination. She also alleged that the Navy is "willfully and intentionally maintaining" the Davis report, although it knows that the report is "grossly inaccurate and incomplete." On

June 2, 1986, the district court granted the Navy's motion for summary judgment, finding that petitioner can obtain no relief because the report is not physically located in her file. App. 14a. Because of this ruling on the threshold issue of the Privacy Act's applicability to the Davis report, petitioner was denied the opportunity to present and prove her claim that the Navy has knowingly maintained an erroneous record regarding her and thus that she is entitled to damages and injunctive relief under the Privacy Act. *See* 5 U.S.C. §§ 552a(g) (1), (4)

Still proceeding *pro se,* petitioner appealed the district court's ruling. In an opinion dated April 14, 1987, the Ninth Circuit affirmed, holding that petitioner was protected by none of the Privacy Act's substantive safeguards – such as the right to amend erroneous records, the right to prevent personal records from being disseminated to the public, and the right to have agency decisions made on the basis of accurate and timely records. The court stated that, because the Act makes these provisions applicable only to agencies that maintain "systems of records" about individuals, the language of the statute "suggests" that they apply exclusively to records which are actually filed in a records system under the individual's name or other personal identifier, such as a social security or military identification number. App. 10a.

Accordingly, the court concluded that, because the Davis report was not accessible from petitioner's own personnel file, she could obtain no relief under the Privacy Act, even if the Navy had prepared the report for impermissible, retaliatory reasons, had used it to make highly damaging decisions about petitioner, and had admitted that it was false. The court of appeals recognized that its decision "provides an easy method for circumventing the Privacy Act," yet it nevertheless concluded that Congress

intended to provide remedies "only for records that are accessible under the Privacy Act because they are individually keyed to the requester." App. 11a. Although the District of Columbia and Fifth Circuits have held that the Privacy Act's protections are not limited to records which are filed under the plaintiff's name or other personal identifier, *see Albright v. United States,* 631 F.2d 915 (D.C. Cir. 1980); *Chapman v. NASA,* 682 F.2d 526 (5th Cir. 1982), the Ninth Circuit did not even attempt to distinguish either of these cases in reaching its opposite conclusion.[1]

REASONS FOR GRANTING THE PETITION

THERE IS A CONFLICT IN THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

1. As a result of the Ninth Circuit decision, there is a conflict in the circuits regarding the scope of the Privacy Act's protections, which this Court should resolve. In *Albright v. United States, supra,* employees of the Department of Health and Human Services sought relief under subsection (e)(7) of the Act, which restricts agencies from maintaining records reflecting an individual's First Amendment activities. The sole record at issue, a secret videotape of a meeting of employees, had been placed in a file that did not bear the name or other identities of any specific employee and, on that basis, the agency argued that the record was not subject to the Privacy Act's protec-

[1] Because petitioner's current counsel did not learn about the court of appeals' decision until long after the fourteen days provided for filing petitions for rehearing had passed, rehearing was not sought.

tions. After analyzing both the language and legislative history of the Privacy Act, the court of appeals for the D.C. Circuit disagreed, ruling that the particular manner in which the videotape was filed did not control whether individuals could pursue a claim under subsection (e)(7) of the Act. The court reasoned that the provision, like all of the substantive requirements in the Act, applies only to agencies that maintain systems of records about individuals because these were "perceived [by Congress] to be the offending agencies." 631 F.2d at 920. However, the D.C. Circuit concluded that the provision does not, by its plain terms, apply only to records that an agency actually places in an individual's own personnel file, and to so restrict it would defeat the purposes of the statute. *Id.* at 918-19. The court therefore remanded the case with instructions that the plaintiffs be permitted to pursue their claim for damages.[2]

Chapman v. National Aeronautics and Space Administration, 682 F.2d 526 (5th Cir. 1982), focused on subsection (e)(5) of the Act, on which petitioner also relied in part, which requires that all agencies keeping systems of records must "maintain *all records* that are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5) (emphasis added). The Fifth Circuit found that this sec-

[2] While the *Albright* decision focused on subsection (e)(7) of the Act, its analysis logically applies to the Privacy Act's other requirements, and it has been so construed in the District of Columbia Circuit. *See Reuber v. United States,* Civ. No. 81-1857, slip op. at 28-29 (D.D.C. Sept. 7, 1984) ("[t]he obligations listed in 5 U.S.C. § 552a(e) relate to any record that the agency keeps, whether the record is actually included in the system or not").

tion of the Act was violated when NASA relied on damaging personal notes of a supervisor to make adverse determinations about an employee, even though those records were not placed in the employee's file in a timely, accurate fashion. According to the court, allowing "an 'ambush' approach to the maintaining of records on employee job performance" cannot be deemed consistent with the "letter and spirit of the Privacy Act." *Id.* at 526.

The Ninth Circuit's decision here is plainly at odds with both *Albright* and *Chapman*. Thus, while the Ninth Circuit has read the Privacy Act as effectively foreclosing *any* remedies for records that an agency declines to place in the plaintiff's own file, App. 11a, the D.C. Circuit concluded in *Albright* that this interpretation is "inconsistent with the plain meaning of the language of the Act." 631 F.2d at 918. Likewise, in direct conflict with the Fifth Circuit's decision, the Ninth Circuit ruled that the Navy's use of the Davis report is exempt from the specific requirements of subsection (e)(5). Thus, under the Ninth Circuit's analysis, the Davis report may be totally false and motivated by retaliation but, merely because it is not retrievable from petitioner's own file, it can continue to be used to make highly detrimental decisions regarding her employment.

The Ninth Circuit did not even attempt to distinguish *Albright* or *Chapman,* although it did cite *Albright* for an unrelated propositon. App. 8a. As a result of these three rulings, the rights of individuals under the Privacy Act are now directly affected by the circuit in which they bring suit. Since all Privacy Act plaintiffs may sue in the District of Columbia as well as the district in which they reside, 5 U.S.C. § 552a(g)(5), persons who have the resources to bring suit in the District of Columbia, and have attorneys who realize the advantage of doing so, will have much

broader rights under the Act than Privacy Act plaintiffs who file suit in the Ninth Circuit.

2. While this Court has resolved more than twenty cases under the FOIA, it has not yet provided the federal courts with any guidance on the scope of its sister statute, the Privacy Act. Both statutes reflect Congress' commitment to open and accountable government. However, while the FOIA was "intended to increase the *public's* access to governmental information," the Privacy Act was "designed to provide *individuals* with more control over the gathering, dissemination, and accuracy of agency information about themselves . . . ." *Greentree v. U.S. Customs Service,* 674 F.2d 74, 76 (D.C. Cir. 1982) (emphasis in original). This case presents a straightforward issue of statutory construction that goes to the core of this legislative scheme. It would, therefore, be appropriate for this Court to review the Ninth Circuit's decision even in the absence of a conflict in the circuits.

If, as the Ninth Circuit held, none of the Privacy Act's provisions apply to records that an agency chooses not to file under an individual's name or other identifier, there is a gaping loophole in the safeguards that Congress fashioned in the Privacy Act. Thus, the decision below allows agencies to act in total disregard of the Privacy Act's substantive requirements — including by freely disseminating personal records that are known to be inaccurate, making vital decisions on the basis of erroneous documents, and maintaining files recording First Amendment activities — so long as the offending documents are not lodged in a file bearing the injured party's name or other identifier. As the D.C. Circuit explained in another recent Privacy Act case, to suggest that an agency may effectively "exempt *itself* from all provisions of the Privacy Act" is to

"defang completely the strict limitations . . . that Congress intended to impose." *Tijerina v. Walters,* No. 85-6420, slip op. at 11, 14 (D.C. Cir. June 30, 1987) (emphasis in original).

The facts of this case vividly illustrate how the Ninth Circuit's decision invites simple and routine subversion of the statute. The sole record at issue is a lengthy and highly derogatory investigative report that was prepared to assist the Navy in making crucial decisions regarding petitioner's livelihood and reputation. Indeed, in response to petitioner's charge of sex discrimination and retaliation, the Navy itself effectively repudiated the report by revoking significant decisions based on it. Nevertheless, the Navy is continuing to maintain the report in its current form, and there is no assurance the report will not be used to make additional adverse decisions about petitioner in the future.

To compound matters, the report is being kept in the file of the subordinate who filed the original grievance against petitioner and who, under the Privacy Act, can obtain the derogatory report and disseminate it to anyone he chooses. To decide, as did the court of appeals, that the subordinate has Privacy Act rights with respect to the Davis report but that petitioner has none — simply because the Navy elected to put the report in the subordinate's file rather than in petitioner's — is to place form on a lofty pedestal, while inflicting serious damage to the substance of the statute. Particularly since two courts of appeals have found that this hypertechnical approach is inconsistent with both the language and the purpose of the Act, review of the Ninth Circuit's decision is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1987

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MERYL SUE BAKER,
Plaintiff-Appellant,
v.
DEPARTMENT OF THE NAVY,
Defendant-Appellee.

No. 86-6077
D.C. No.
CV-85-2650-K-(I)
OPINION

Argued and Submitted
February 5, 1987—Pasadena, California

Filed April 14, 1987

Before: Dorothy W. Nelson and Robert R. Beezer, Circuit Judges, and Edward Leavy,* District Judge.

Opinion by Judge Nelson

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

SUMMARY

Constitutional Law/Freedom of Information

Appeal from judgment. Affirmed.

Appellant Baker, a Navy civilian employee, filed a civil suit against the appellee the Department of the Navy, alleging that the Navy violated the Privacy Act (Act) by refusing to amend

*Honorable Edward Leavy, United States District Judge, District of Oregon, sitting by designation.

or expunge an investigative report in its employee grievance file that was indexed under the name of one of Baker's subordinates who had filed an administrative grievance against Baker based on her treatment of him. The district court granted the Navy's motion for summary judgment, finding that the Privacy Act did not grant access to the investigative report because it was not retrievable under Baker's name or other identifiers listed in the Act. Because the report was not accessible under the Act, Baker could not invoke the remedy of amendment under the Act. This court affirms.

[1] Baker contends that, because the Navy allegedly took adverse actions against her based on an inaccurate and incomplete report, the report is an accessible record under the Privacy Act. The case law and federal regulations have given a more narrow reading to the scope of accessibility under the Act. [2] This court accords the Office of Management and Budget (OMB) and the Navy's interpretation of system of records deference.[3] Congress has not responded to the criticisms of the restrictive scope of accessibility in the Act. The OMB guidelines, federal regulations, and existing case law provide overwhelming support for using a record's method of retrievability to determine the scope of accessibility. This court declines to adopt Baker's contention that an alleged adverse impact from a record that pertains to her, but is not retrievable under her name, renders the record accessible under the Act. She is unable to sustain her claim of a right to amend or expunge the report on the ground that it is accessible under the Act. [4] The statutory language suggests that the scope of accessibility and the scope of amendment are coextensive. The Privacy Commission corroborates that statutory language requires this conclusion. [5] Although Baker raises a cogent argument that the narrowness of the statutory definition provides an easy method for circumventing the Act, she fails to set forth any evidence to support an allegation of evasive tactics by the Navy that would preclude summary judgment.[6] An individual's ability to obtain access to a record under the Freedom of Information Act, or because of

personal knowledge of its existence in a certain file, will not provide that individual with access to the record or to any remedies under the Privacy Act.

COUNSEL

Meryl Sue Baker, San Diego, California, for the plaintiff-appellant.

Beth L. Levine, San Diego, California, for the defendant-appellee.

OPINION

NELSON, Circuit Judge:

Meryl Sue Baker, a Navy civilian employee, filed a civil suit against the Department of the Navy, alleging that the Navy violated the Privacy Act, 5 U.S.C. § 552a (1982), by refusing to amend or expunge an investigative report in its employee grievance file that was indexed under the name of one of Baker's subordinates. The report was prepared in response to an administrative grievance filed against Baker by that subordinate. She sought (1) an injunction prohibiting dissemination of the report and requiring amendment or expungement of the report, and (2) damages and costs.

The district court granted the Navy's motion for summary judgment, finding that the Privacy Act did not grant access to the investigative report because it was not retrievable under Baker's name or other identifiers listed in 5 U.S.C. § 552a(a)(4). The district court concluded that, because the report was not accessible under the Privacy Act, Baker could not invoke the remedy of amendment under the Privacy Act. Baker appeals from the grant of summary judgment. We note jurisdiction under 28 U.S.C. § 1291 (1982) and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Baker is a civilian employee of the Navy, serving as a Supervisory Personnel Research Psychologist at the Navy Personnel Research and Development Center in San Diego, California. One of the researchers she supervised, Dr. Eugene Rocklyn, filed an administrative grievance against Baker based on her treatment of him. Lieutenant Ken Davis was assigned to investigate Dr. Rocklyn's charges. Davis prepared a memorandum of his findings ("Davis report") and filed it in the employee grievance file under Rocklyn's name without indexing or cross-referencing it to Baker's name or file.

Baker contends that the Navy intentionally and willfully created the "grossly inaccurate and incomplete" report. Baker also claims that the Davis report was used as the basis for several adverse personnel actions including (1) demoting her from a supervisory to a nonsupervisory position, (2) issuing her a letter of reprimand, and (3) rating her performance as "marginal." However, all of these adverse actions were subsequently rescinded in a settlement of Baker's administrative complaints alleging employment discrimination and retaliation. The Navy restored her to her supervisory position, expunged the letter of reprimand from her file, and changed her performance rating from "marginal" to "outstanding."

On July 1, 1985, Baker submitted a request to receive a copy of the Davis report under the Freedom of Information Act, 5 U.S.C. § 552 (1982), and the Privacy Act. Baker eventually gained access to an edited version of the Davis report under the Freedom of Information Act on August 18, 1985. In early September 1985, Baker submitted a request to expunge the Davis report from Dr. Rocklyn's file under the Privacy Act. The Commanding Officer denied her request in a letter explaining that, because the record was not retrievable under her name, it was not a record covered by the Privacy Act. The Commanding Officer informed Baker of her right to submit a written rebuttal to the Davis report which could be

appended to the report. Baker rejected the offer and to date has not filed a rebuttal, preferring to obtain amendment or expungement of the report. She fears that the continued existence of the Davis report, and its accessibility to Navy personnel and to Dr. Rocklyn, might result in future adverse employment decisions or professional humiliation.

On October 28, 1985, Baker filed suit against the Navy under the civil remedies provision of the Privacy Act, 5 U.S.C. § 552a(g)(1). Baker proceeded *pro se* in the district court and on appeal. On April 29, 1986, the Navy filed a motion for summary judgment. The district court granted the Navy's motion on June 2, 1986, finding that the Davis report does not qualify as a record within a "system of records" under the Privacy Act because it is not retrievable under Baker's name or other personal identifier. The court further concluded that the Privacy Act remedies of amendment and expungement are inapplicable to a report that is not accessible under the Act. Baker filed a timely notice of appeal.

ISSUES PRESENTED

1. Whether a report that is not retrievable under a requester's name or other personal identifier is accessible to that requester under the Privacy Act.

2. Whether the amendment remedy under the Privacy Act applies to a report that is not accessible under the Privacy Act, but is otherwise accessible (*e.g.*, under the Freedom of Information Act).

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo. *Hewitt v. Grabicki*, 794 F.2d 1373, 1376 (9th Cir. 1986). The evidence is viewed in the light most favorable to the party opposing the motion. *Id.* We affirm only if there is an absence of any genuine issue of material fact and if the

moving party is entitled to judgment as a matter of law. *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985). Because Baker has proceeded *pro se*, we construe her complaint liberally. *See Boag v. MacDougall*, 454 U.S. 364, 365 (1982); *Mann v. City of Tucson*, 782 F.2d 790, 794 (9th Cir. 1986) (per curiam).

DISCUSSION

I. *ACCESSIBILITY UNDER THE PRIVACY ACT*

[1] Baker contends that, because the Navy allegedly took adverse actions against her based on an inaccurate and incomplete report, the report is an accessible record under the Privacy Act. Consequently, she argues, she is entitled to the remedies under the Privacy Act. The case law and federal regulations, however, have given a more narrow reading to the scope of accessibility under the Privacy Act.

Under the Privacy Act, each agency maintaining a "system of records" must "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." 5 U.S.C. § 552a(e)(5). The Act permits individuals to obtain access to records pertaining to them that are within a "system of records" maintained by a federal agency. 5 U.S.C. § 552a(d)(1); *Exner v. Federal Bureau of Investigation*, 612 F.2d 1202, 1203-04 (9th Cir. 1980). In addition, an individual is permitted "to request amendment of a record pertaining to him" from an agency that maintains a "system of records." 5 U.S.C. § 552a(d)(2); *see also England v. Commissioner*, 798 F.2d 350, 351 (9th Cir. 1986). The statute defines a "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

The Office of Management and Budget promulgated guidelines pursuant to § 6 of the Privacy Act, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (uncodified in the United States Code). *See* Office of Management and Budget Guidelines to the Privacy Act, 40 Fed. Reg. 28,949 (1975); Supplementary Guidelines, 40 Fed. Reg. 56,741 (1975) [hereinafter OMB Guidelines]. The guidelines note that the access provision of the Privacy Act, 5 U.S.C. § 552a(d)(1), applies only to records contained in a "system of records" as defined in § 552a(a)(5). OMB Guidelines, 40 Fed. Reg. at 28,957. The guidelines further observe that the statutory language suggests that

> Congress did not intend to require that an individual be given access to information which the agency does not retrieve by reference to his or her name or some other identifying particular .... If an individual is named in a record about someone else ... and the agency only retrieves the portion pertaining to him by reference to the other person's name ... the agency is not required to grant him access. Indeed, if this were not the case, it would be necessary to establish elaborate cross-references among records, thereby increasing the potential for privacy abuses.

Id. The guidelines offer an example that parallels the facts in this case:

> A reference to Joan Doe in a record about James Smith in the same file. This is ... a record within a system but Joan Doe would not have to be granted access unless the agency had *devised and used* an indexing capability to gain access to her record in James Smith's file.

Id. (emphasis added).

Although the OMB guidelines do not bind the courts, *Zeller v. United States*, 467 F. Supp. 487, 497 & n.12 (E.D.N.Y.

1979), the courts look to them for guidance. *See, e.g., Exner,* 612 F.2d at 1208-09 (Pregerson, J., concurring); *Albright v. United States,* 631 F.2d 915, 919-20 n.5 (D.C. Cir. 1980) (stating that OMB guidelines to the Privacy Act "are owed the deference usually accorded interpretation of a statute by the agency charged with its administration").

[2] Additional support for the OMB interpretation is found in the regulations promulgated by the Navy to implement the Privacy Act. 32 C.F.R. §§ 701.1-701.118 (1986). Section 701.103(a) restricts access to records pertaining to an individual that are part of a "system of records." A "system of records" is defined as

> A group of records from which information "is", as opposed to "can be", retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. The capability to retrieve information by personal identifiers alone does not subject a system of records to 5 U.S.C. 552a.

32 C.F.R. § 701.103(n) (1986). We accord this interpretation similar deference. *Cf. Blevins v. Plummer,* 613 F.2d 767, 768 (9th Cir. 1980) (per curiam) (following Air Force regulations implementing the Privacy Act).

The legislative history of the Privacy Act indicates that Congress was primarily concerned with the potential misuse of personally identifiable information stored in computers. *See* S. Rep. No. 1183, 93d Cong., 2d Sess. 1-2 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6916, 6916-17. Congress therefore designed the Act to grant individuals access to those records that federal agencies could retrieve through their computer systems via personal identifiers. *See* Privacy Act, § 2, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (uncodified in the United States Code), *reprinted in* 5 U.S.C. § 552a note (congressional findings and statement of pur-

pose). As a result, the definition of "system of records" makes coverage under the Act dependent upon the method of retrieval of a record rather than its substantive content. Privacy Protection Study Commission, *Personal Privacy in an Information Society* 503-04 (1977) [hereinafter Privacy Commission]; Ehlke, *The Privacy Act After a Decade,* 18 J. Marshall L. Rev. 829, 831 (1985).

This narrow reach of accessibility has been criticized for undermining the congressional purpose of giving individuals access to records an agency maintains on them, and for effecting a "wholesale exclusion from the Act's scope of records that are not accessed by name" or other personal identifier. Privacy Commission, *supra,* at 503-04; *see Unt v. Aerospace Corp.,* 765 F.2d 1440, 1450-52 (9th Cir. 1985) (Ferguson, J., dissenting). In fact, the Privacy Commission, in response to the congressional mandate to examine the Act and submit recommendations to the President and Congress, *see* 5 U.S.C. § 552a note, considered as "essential" the abandonment of the "system of records" term for a broader term that would not limit access to records retrievable only by individual identifiers. Privacy Commission, *supra,* at 503-04, 533.

[3] Congress has not responded to the criticisms of the restrictive scope of accessibility in the Act. The OMB guidelines, federal regulations, and existing case law provide overwhelming support for using a record's method of retrievability to determine the scope of accessibility. *See, e.g., Cuccaro v. Secretary of Labor,* 770 F.2d 355, 360 (3d Cir. 1985); *Thomas v. United States Dep't of Energy,* 719 F.2d 342, 345-46 (10th Cir. 1983); *Boyd v. Secretary of the Navy,* 709 F.2d 684, 686 (11th Cir. 1983), *cert. denied,* 464 U.S. 1043 (1984); *Kalmin v. Department of the Navy,* 605 F. Supp. 1492, 1495 (D.D.C. 1985); *Grachow v. United States Customs Serv.,* 504 F. Supp. 632, 636 (D.D.C. 1980); *Savarese v. United States Dep't of Health, Educ. & Welfare,* 479 F. Supp. 304, 307 (N.D. Ga. 1979), *aff'd,* 620 F.2d 298 (5th Cir. 1980), *cert. denied,* 449 U.S. 1078 (1981). Therefore, we decline to

adopt Baker's contention that an alleged adverse impact from a record that pertains to her, but is not retrievable under her name, renders the record accessible under the Privacy Act. Accordingly, she is unable to sustain her claim of a right to amend or expunge the Davis report on the ground that it is accessible under the Privacy Act.

II. *Amendment of Records Inaccessible Under the Privacy Act, But Otherwise Accessible*

[4] The district court agreed with the Navy's argument that "[s]ince the report cannot be accessed by plaintiff's identifiers, the Privacy Act does not apply and the report cannot be amended or expunged." The district court's analysis, therefore, presupposes that an amendment to a record that is inaccessible under the Privacy Act cannot be made even if the record is otherwise accessible (as in this case, under the Freedom of Information Act). The district court's conclusion appears to be supported by the statutory language. The subsections that grant access to records (§ 552a(d)(1)), permit requests for amendment (§ 552a(d)(2)), and require that records used in making determinations about individuals are maintained in a reasonably accurate and complete manner (§ 552a(e)(5)), all apply to an agency that "maintains a system of records." The statutory language therefore suggests that the scope of accessibility and the scope of amendment are coextensive. The Privacy Commission corroborates that the statutory language requires this conclusion. Privacy Commission, *supra*, at 503-04 (stating that if records are not accessed by name, none of the Act's protections apply); *see also Clarkson v. IRS*, 678 F.2d 1368, 1377 (11th Cir. 1982) ("[T]he language of subsection (e)(5) cannot be read to apply to records not incorporated within an agency's system of records."); Ehlke, *supra*, at 842 ("Only records that are retrievable and are actually retrieved from a system of records are covered by the Act.").

[5] One of Congress's underlying concerns in narrowly defining a system of records appears to have been efficiency.

See OMB Guidelines, 40 Fed. Reg. at 28,957 (expressing concern over the need for "elaborate cross-references among records"). Congress was aware of the potential burden on agencies if access to records were not circumscribed in some manner. Privacy Commission, *supra*, at 503. But Baker raises a competing concern. She argues that the narrowness of the statutory definition provides an easy method for circumventing the Privacy Act: agencies can simply neglect to index a particular file pertaining to an employee under that employee's name. The argument is a cogent one and the potential for abuse that Baker pinpoints is real. *See, e.g.*, Privacy Commission, *supra*, at 504 n.7 (recounting incident in which an agency rearranged personnel records by Civil Service grade instead of personal identifiers to circumvent the Act's requirements); *Unt*, 765 F.2d at 1452 (Ferguson, J., dissenting) (observing that if the Act is applied woodenly, it offers no protection if personal data is misfiled or filed with other data). However, Baker failed to set forth any evidence to support an allegation of evasive tactics by the Navy that would substantiate such a theory and preclude summary judgment. *See Kalmin*, 605 F. Supp. at 1495 n.5 (stating that it is impermissible to file records without identifiers in order to evade requests under the Privacy Act, but requiring evidence to support allegations of evasion rather than relying on inferences).

CONCLUSION

[6] We affirm the district court's grant of summary judgment. Congress intended to provide the remedies of amendment or expungement only for records that are accessible under the Privacy Act because they are individually keyed to the requester. Therefore, an individual's ability to obtain access to a record under the Freedom of Information Act, or because of personal knowledge of its existence in a certain file, will not provide that individual with access to the record or to any remedies under the Privacy Act.

AFFIRMED

APPENDIX B

ARMS UNIT

JUDGMENT

May 7 - 1987

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MERYL SUE BAKER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 86-6077
	)	D.C. No: CV-85-
DEPARTMENT OF THE NAVY,	)	2650-K(I)
	)	
Defendant-Appellee.	)	
	)	

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the appeal judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

DATE ISSUED: MAY 6 1987

Filed and entered April 14, 1987

A TRUE COPY MAY 6 1987
ATTEST
Clerk of Court
by: /s/ Joseph Williams
Deputy Clerk

APPENDIX C

PETER K. NUNEZ
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BETH L. LEVINE
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San Diego, California 92189-0150
Telephone: (619) 293-5662

Attorneys for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MERYL SUE BAKER,	)	CIVIL NO.
	)	85-2650-K-(I)
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
DEPARTMENT OF THE NAVY,	)	
	)	
Defendant.	)	
	)	

This matter came on for hearing on May 19, 1986 on defendant's motion for summary judgment. Meryl Sue Baker appeared on her own behalf. Beth L. Levine, Assistant U.S. Attorney, appeared on behalf of the defendant.

The Court has considered the papers filed with regard to the motion for Summary Judgment and has reviewed the entire file. The Court has also heard oral argument. The Court concludes that plaintiff is deemed to have exhausted her administrative remedies and it therefore assumes jurisdiction. The Court also concludes that to the extent that

plaitniff intended to name Commander Kohler as a defendant, the complaint is dismissed with prejudice as to him. The Court further concludes that Summary Judgment is appropriate. The Davis report does not qualify as a record under the Privacy Act. It is not retrievable under plaintiff's name or other identifiers listed under 5 U.S.C. §552a(a)(4) and (5). Since the report cannot be accessed by plaintiff's identifiers, the Privacy Act does not apply and the report cannot be amended or expunged. Accordingly,

IT IS HEREBY ORDERED that defendant's motion for Summary Judgment is granted.

DATED: June 02 1986

JUDITH N. KEEP
Judge of the District Court

PRESENTED BY:

PETER K. NUNEZ
United States Attorney

/s/ Beth L. Levine
BETH L. LEVINE
Assistant U.S. Attorney
Attorneys for Defendant

APPROVED AS TO FORM:

/s/ Meryl Sue Baker
MERYL SUE BAKER

Re: Meryl Sue Baker v. Department of the Navy
Civil No. 85-2650-K(I)

FILED
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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

APPENDIX D

RELEVANT STATUTORY PROVISIONS

The Privacy Act, 5 U.S.C. § 552a, provides in relevant part:

(a) DEFINITIONS – For purposes of this section –

* * * *

(3) the term 'maintain' includes maintain, collect, use, or disseminate;

* * * *

(5) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

* * * *

(d) ACCESS TO RECORDS – Each agency that maintains a system of records shall –

(1) Upon request by an individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and –

(A) Not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of re-

ceipt of such request, acknowledge in writing such receipt; and (B) promptly, either –

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal . . .

(4) in any disclosure containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendment requested, to persons or other agencies to whom the disputed record has been disclosed;

* * * *

(e) AGENCY REQUIREMENTS – each agency that maintains a system of records shall –

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute, or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information

may result in adverse determinations about an individual's rights, benefits and privileges under Federal programs;

* * * *

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made purusant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

* * * *

(g)(1) CIVIL REMEDIES – Whenevery any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any

determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil a action against the agency, and the district courts of the Untied States shall have jurisdiction in the matters under the provisions of this subsection.

* * * *

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-268 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1987

MERYL SUE BAKER, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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17 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether the Privacy Act of 1974, 5 U.S.C. (& Supp. III) 552a, grants an individual a right to obtain amendment of a record that is maintained by an agency but is not retrieved by use of his name or other personal identifier.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-268

MERYL SUE BAKER, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 814 F.2d 1381. The order of the district court (Pet. App. 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on April 14, 1987. By order dated July 1, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 17, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a civilian employee of the Department of the Navy, serving as a Supervisory Personnel Research Psychologist at the Personnel Research and Development Center in San Diego, California. In February 1985, Dr. Eugene Rocklyn, one of petitioner's subordinates at the

Center, filed an administrative grievance against her. The Navy subsequently assigned Lieutenant Commander Ken Davis to investigate Dr. Rocklyn's charges. Lieutenant Commander Davis prepared a memorandum of his findings (the Davis report), and that report was placed in the file pertaining to Dr. Rocklyn's grievance. The Davis report was not placed in petitioner's personnel file and was not indexed or cross-referenced to petitioner's name or file. Pet. App. 4a.

In July 1985, petitioner submitted a request for access to the Davis report in Dr. Rocklyn's file, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. III) 552, and the Privacy Act of 1974, 5 U.S.C. 552a(d). Petitioner gained access to an edited version of the Davis report under the FOIA in August 1985.[1] In September 1985, petitioner submitted a request under the Privacy Act, 5 U.S.C. 552a(d)(2), to amend the Davis report or to expunge it altogether from Dr. Rocklyn's file. The Center's Commanding Officer denied her request, explaining that because the Davis report could not be retrieved by reference to her name or personal identifier, it is not, as regards petitioner, a record subject to the Privacy Act. Nevertheless, as a matter of administrative discretion, the Commanding Officer offered to allow petitioner to submit a written rebuttal to the Davis report, which would be appended to the report. Petitioner declined that offer. Pet. App. 4a-5a.

2. a. Petitioner then brought this action in the United States District Court for the Southern District of Califor-

---

[1] Petitioner subsequently filed an administrative grievance alleging employment discrimination and retaliation. She contended that she was improperly demoted from a supervisory to a nonsupervisory position, issued a letter of reprimand, and rated "marginal" in her performance. Pursuant to a settlement of that matter, the Navy restored petitioner to her supervisory position, expunged the letter of reprimand from her personnel file, and changed her performance rating from "marginal" to "outstanding." Pet. App. 4a.

nia, under the Privacy Act, 5 U.S.C. 552a(g)(1), seeking amendment or expungement of the Davis report in Dr. Rocklyn's file, an injunction prohibiting dissemination of the report, and damages (Pet. App. 3a). The district court granted the Navy's motion for summary judgment, finding that the Davis report is not a record for purposes of the Privacy Act because it is not retrieved by use of petitioner's name or other personal identifier, which, under 5 U.S.C. 552a(a)(4) and (5), is a precondition to application of the Act. Pet. App. 13a-14a.

b. The court of appeals affirmed (Pet. App. 1a-11a), rejecting petitioner's contention that because the Navy allegedly took adverse action against her in the past based on the Davis report, the report was subject to amendment at her request under the Privacy Act (*id.* at 6a). Like the district court, the court of appeals construed the access provision of the Act, 5 U.S.C. 552a(d)(1), to apply to a record about an individual only when that record is contained within a "system of records" from which it is retrieved by use of the requester's name or personal identifier (Pet. App. 6a-10a). The court found support for "using a record's method of retrievability to determine the scope of accessibility" (*id.* at 9a) in the text and legislative history of the Privacy Act, the Office of Management and Budget's Guidelines construing the Act, the Navy Department's regulations implementing the Act, and settled case law (*id.* at 7a-9a).

The court of appeals further held that the language of the Privacy Act compels the conclusion that "an amendment to a record that is inaccessible under the Privacy Act cannot be made even if the record is otherwise accessible (as in this case, under the Freedom of Information Act)" (Pet. App. 10a). The court noted that the subsections of the Act that grant access to records (5 U.S.C. 552a(d)(1)), permit requests for amendment (5 U.S.C. 552a(d)(2)), and

require that records used in making determinations about individuals be maintained in a reasonably accurate and complete manner (5 U.S.C. 552a(e)(5)) all apply only to an agency that "maintains a system of records" (Pet. App. 10a). In the court's view, this language "suggests that the scope of accessibility and the scope of amendment are coextensive"—an interpretation the court found supported by the Privacy Protection Study Commission's report on the Privacy Act soon after it was passed. See *Personal Privacy in an Information Society* 503-504 (1977). Pet. App. 10a.

Finally, the court rejected petitioner's contention that a broader application of the Act is required because an agency might seek to circumvent the Act by neglecting to index a particular record pertaining to an employee under that employee's name (Pet. App. 11a). The court explained that the limitation of the access and amendment provisions of the Act to records that are retrieved by use of the requester's name or other identifier promotes efficiency and protects against the administrative burden that federal agencies otherwise would experience if they were effectively required to establish " 'elaborate cross-references among records' " (*id.* at 10a-11a, quoting 40 Fed. Reg. 28957 (1975)(OMB Guidelines)). The court also found that in this case, petitioner has "failed to set forth any evidence to support an allegation of evasive tactics by the Navy that would substantiate such a theory and preclude summary judgment" (Pet. App. 11a, citing *Kalmin* v. *Department of the Navy*, 605 F. Supp. 1492, 1495 n.5 (D.D.C. 1985)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. The court of appeals followed the interpretation that was given to the access provision of the Privacy Act by OMB when it promulgated its Guidelines

in 1975 and that has been consistently followed by the courts ever since. This case therefore does not present any important issue warranting review by this Court.

1. As the court of appeals recognized, its interpretation of the access and amendment provisions of the Privacy Act is supported by the text, legislative history, and settled administrative and judicial interpretation of the Act.

a. A number of sections of the Privacy Act demonstrate that the provisions relevant here, which give an individual a right of access to records pertaining to him and an opportunity for amendment of any such records that are not reasonably accurate, are limited to records that are retrieved by use of the requester's name or other personal identifier. It is such records that presented the danger to which the Act was directed, and the Act's focus on such records keeps its administration within clearly identified and manageable limits.

The Act's definitional sections demonstrate that it is concerned with the contents of records that both (i) contain information about a particular individual, and (ii) may be retrieved by use of that individual's name or personal identifier. Thus, the Act defines the term "record" to mean "any item, collection, or grouping of information about an individual that is maintained by an agency * * * *and* that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. 552a(a)(4) (emphasis added). The Act then defines the term "system of records" as "a group of any records under the control of any agency *from which information is retrieved by the name of the individual* or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. 552a(a)(5) (emphasis added).

This scope of the Act also is reflected in the substantive provisions upon which petitioner relies. Under 5 U.S.C. 552a(e), an agency that maintains a "system of records" has a number of duties with respect to that system. Petitioner relies (Pet. 7) on 5 U.S.C. 552a(e)(5), which provides that an agency must maintain all records that are used in making any determination about an individual "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." Congress presumably contemplated that an agency could use a particular record in making a determination about an individual only if the record were retrieved by use of that individual's name or other personal identifier.[2]

Similarly, 5 U.S.C. 552a(d), which affords a right of access to records covered by the Act (5 U.S.C. 552a(d)(1)), applies to agencies that maintain a "system of records"; the definition of the quoted term alone suggests that the access provision is concerned with records that are retrieved by use of the requester's name or identifier. That limitation also is suggested by common sense: an agency could not realistically locate and afford access to all information anywhere in a potentially vast system of records that might mention the requester unless it maintained an elaborate cross-index.

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[2] Moreover, where, as here, the record is contained in another file, the agency typically would not use it to make a determination about the individual unless it was *in fact* retrieved from the other file and placed in the administrative record on which the determination was to be made. In the process, the record presumably would have been made part of a file from which it could be retrieved by using the individual's name or personal identifier, which would trigger application of the Privacy Act. Petitioner's contention (Pet. 9) that the court of appeals' construction will enable agencies to "mak[e] vital decisions on the basis of erroneous documents" therefore is without merit.

Section 552a(d) further provides that an agency maintaining a "system of records" must permit an individual who has a right of access to request amendment of a "record pertaining to him" that "the individual believes is not accurate, relevant, timely, or complete" (5 U.S.C. 552a(d)(2)). There is no reason to believe that Congress intended to confer on an individual a right to insist upon an amendment of a record that is contained not in his own personnel or other file, but in the file compiled about another person who has an independent interest in its contents. Moreover, the right to request amendment of an allegedly inaccurate record is one means of enforcing 5 U.S.C. 552a(e)(5), discussed above, which requires an agency to assure the reasonable accuracy of records that are to be used in making a determination about an individual. As we have explained (see page 6, *supra*), Congress presumably expected that an agency would use a record to make a determination about an individual only when it is retrieved by use of that person's name or other personal identifier.

Thus, the limitation the court of appeals applied in this case is woven throughout the operative provisions of the Privacy Act.[3]

b. The Guidelines promulgated by OMB in 1975 to assist federal agencies in their implementation of the Privacy Act construe the access provisions of the Act in the manner indicated by their language. Indeed, as the court of appeals observed, the Guidelines anticipated the precise

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[3] As the court of appeals observed, this interpretation of the Act also is supported by the legislative history, which reflects a congressional concern about the possible misuse of personally identifiable information stored in computers. See Pet. App. 8a (citing S. Rep. 93-1183, 93d Cong., 2d Sess. 1-2 (1974)).

question presented here. See Pet. App. 7a (quoting 40 Fed. Reg. 28957 (1975)(emphasis added by the court)):

> Congress did not intend to require that an individual be given access to information which the agency does not retrieve by reference to his or her name or some other identifying particular. * * * If an individual is named in a record about someone else * * * and the agency only retrieves the portion pertaining to him by reference to the other person's name * * * the agency is not required to grant him access. Indeed, if this were not the case, it would be necessary to establish elaborate cross-references among records, thereby increasing the potential for privacy abuses.
>
> * * * * *
>
> [Example:] A reference to Joan Doe in a record about James Smith in the same file. This is * * * a record within a system but Joan Doe would not have to be granted access unless the agency had *devised and used* an indexing capability to gain access to her record in James Smith's file.

The interpretation given the Privacy Act in the Guidelines issued by OMB, which was expressly given responsibility by Congress to oversee the implementation of the Act,[4] is entitled to deference by the courts (see Pet. App. 8a-9a)—especially since the Guidelines were promulgated soon after the Act was passed and they formed the basis for the procedures followed by all federal agencies in their implementation of the Act. This requirement of deference to the OMB Guidelines also was recognized by the District of Columbia Circuit in the decision upon which petitioner

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[4] The Office of Management and Budget promulgated its guidelines pursuant to Section 6 of the Privacy Act, which directs OMB to issue guidelines "for the use of agencies in implementing [the Act]" and to "provide continuing assistance to and oversight of the implementation of [the Act] * * * by agencies." 5 U.S.C. 552a note.

principally relies in urging the Court to grant review. See *Albright* v. *United States*, 631 F. 2d 915, 919-920 n.5 (D.C. Cir. 1980).

c. Finally, the court of appeals' interpretation of the access and amendment provisions of the Privacy Act is supported by the uniform holdings of the other courts that have considered the scope of the access provision. See *Cuccaro* v. *Secretary of Labor*, 770 F.2d 355, 360 (3d Cir. 1985); *Boyd* v. *Secretary of the Navy*, 709 F.2d 684, 686 (11th Cir. 1983), cert. denied, 464 U.S. 1043 (1984); *Kalmin* v. *Department of the Navy*, 605 F. Supp. 1492, 1495 (D.D.C. 1985); *Grachow* v. *Customs Service*, 504 F. Supp. 632, 636 (D.D.C. 1980); cf. *Savarese* v. *Department of HEW*, 479 F. Supp. 304, 307 (N.D. Ga. 1979), aff'd mem. *sub nom. Savarese* v. *Harris*, 620 F.2d 298 (5th Cir. 1980) (Table), cert. denied, 449 U.S. 1078 (1981) (Pet. App. 7a-9a).[5]

2. a. There is no merit to petitioner's contention (Pet. 6-8) that the decision below conflicts with *Albright* v. *United States*, 631 F.2d 915 (D.C. Cir. 1980). *Albright* involved 5 U.S.C. 552a(e)(7), which generally prohibits an agency from collecting, maintaining, or using records describing how any individual exercises his First

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[5] It is unclear whether petitioner renews before this Court her argument that the Privacy Act's amendment provision, 5 U.S.C. 552a(d)(2), applies to the allegedly inaccurate Davis report (see 5 U.S.C. 552a(e)(5)) that is accessible in some other manner (here, under the FOIA) but is not retrieved by use of her name. In any event, the court of appeals correctly rejected that contention, relying on the language of the Act limiting those provisions to an agency that "maintains a system of records" (Pet. App. 10a). Cf. *Thomas* v. *Department of Energy*, 719 F.2d 342, 345-346 (10th Cir. 1983); *Olberding* v. *Department of Defense*, 709 F.2d 621, 622 (8th Cir. 1983); *Clarkson* v. *IRS*, 678 F.2d 1368, 1377 (11th Cir. 1982); *Doyle* v. *Behan*, 670 F.2d 535, 538-539 (5th Cir. 1982); *Hanley* v. *Department of Justice*, 623 F.2d 1138, 1139 (6th Cir. 1980).

Amendment rights. The District of Columbia Circuit held that that prohibition applies to the collection of a record even though it has not been incorporated into a system of records. 631 F.2d at 918-920. However, the expansive construction of Subsection (e)(7) in *Albright* rested primarily upon a perceived congressional intent to afford First Amendment rights "special and sensitive" treatment under the Privacy Act. 631 F.2d at 919. Thus, the court emphasized that the Act's legislative history reveals Congress's "special concern for the protection of First Amendment rights, as borne out by statements regarding 'the preferred status which the Committee intends managers of information technology to accord to information touching areas protected by the First Amendment of the Constitution' " (*ibid.*, quoting S. Rep. 93-1183, 93d Cong., 2d Sess. 56 (1974)).

Although *Albright's* conclusion that Subsection (e)(7) has a uniquely broad scope has been adopted by the Eleventh Circuit (see *Boyd* v. *Secretary of the Navy*, 709 F.2d at 687; *Clarkson* v. *IRS*, 678 F.2d 1368, 1373-1375 (11th Cir. 1982)) and, indeed, by the Ninth Circuit in another case (see *MacPherson* v. *IRS*, 803 F.2d 479, 481 (9th Cir. 1986)),[6] no court of appeals has applied that broad rule of construction to any other provision of the Privacy Act, including the accuracy, access and amendment provisions at issue here.[7] Moreover, the Eleventh Circuit has specifically held that *Albright*'s expansive

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[6] In light of the Ninth Circuit's adoption of *Albright*'s broad construction of Subsection (e)(7) in *MacPherson*, there is no merit to petitioner's contention (Pet. 8-9) that a plaintiff who files suit in the Ninth Circuit will have narrower Privacy Act rights than a plaintiff who files suit in the District of Columbia Circuit will have under *Albright*.

[7] In fact, in *Albright* itself, the District of Columbia Circuit expressly distinguished *Denson* v. *Alexander*, No. 76-L1332-S (N.D. Ala. Feb. 2, 1977), which held that the access and amendment provisions of the Act apply only to records incorporated into the agency's system of records, from which they can be retrieved by use of an individual's name or other personal identifier. Without expressing a

construction of Subsection (e)(7) does not extend to Subsection (e)(5), which petitioner invokes in this case and which, like the access provision, applies only to those records that are contained in a "system of records." See *Clarkson* v. *IRS*, 678 F.2d at 1377, discussed at note 5, *supra*; see also *Fagot* v. *FDIC*, 584 F. Supp. 1168, 1175 (D.P.R. 1984) (emphasis added) ("[t]he *only* exception to * * * the 'system of records' requirement refers to violations of 5 U.S.C. Sec. 552a(e)(7)"), aff'd in part and rev'd in part, 760 F.2d 252 (1st Cir. 1985) (Table). Petitioner's contention that the decision below conflicts with *Albright* therefore is without merit.[8]

b. There also is no merit to petitioner's contention (Pet. 7-8) that the court of appeals' decision conflicts with *Chapman* v. *NASA*, 682 F.2d 526 (5th Cir. 1982). The Fifth Circuit held in *Chapman* that under 5 U.S.C. 552a(e)(5), when a supervisor's private notes bearing negatively on an employee's job performance are used to

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view as to the correctness of *Denson*, the District of Columbia Circuit observed that *Denson* concerned access to and correction of records that were properly in the possession of the agency, while the issue in *Albright* was whether the agency had properly collected the information in the first place. Petitioner does not contend that here, as in *Albright*, the agency had no authority to procure the Davis report in the first place.

[8] In *Dickson* v. *OPM*, 828 F.2d 32 (D.C. Cir. 1987), the court held that an individual may seek damages under 5 U.S.C. 552a(g)(1)(C) as a result of an agency's alleged failure to maintain accurate records, even if an adverse determination is made by another agency on the basis of the same records. *Dickson* has no bearing on this case. *Dickson* involved records that were in the plaintiff's own file, not, as here, in the file of *another* person. Moreover, petitioner seeks an amendment of a record so that it will conform with the accuracy requirement of 5 U.S.C. 552a(e)(5); unlike the plaintiff in *Dickson*, she does not seek only damages. In fact, the District of Columbia Circuit in *Dickson* expressly distinguished a claim under 5 U.S.C. 552a(e)(5) from a damage claim under 5 U.S.C. 552a(g)(1)(C). See *Dickson*, 828 F.2d at 38-39.

support a discharge decision, those notes must be incorporated into the employee's file in a timely manner, in order to allow the employee a fair opportunity to respond. 682 F.2d at 529. *Chapman* therefore proceeded on the premise that the records in question were covered by the Act, and it considered only the question of the agency's compliance with the "timeliness" requirement imposed by 5 U.S.C. 552a(e)(5). 682 F.2d at 529. This case, by contrast, presents no question pertaining to the timeliness requirement.

3. Finally, although the Privacy Act does not afford petitioner a right of access to the Davis report or a right to have the report amended while it is in Dr. Rocklyn's file, the Commanding Officer of the Center nevertheless offered her an opportunity to submit a rebuttal to the report, which would be filed with it in Dr. Rocklyn's file. Petitioner, however, declined that offer. See page 2, *supra*. Thus, it is pure hyperbole for petitioner to contend that the court of appeals has condoned the continued use of the Davis report to make "highly detrimental decisions regarding her employment" (Pet. 8). In fact, the court of appeals specifically found no basis for any claim of "evasive tactics" by the Navy (Pet. App. 11a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 87-268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MERYL SUE BAKER,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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Far from demonstrating that the Court should not grant review in this case, respondent's brief serves to highlight the importance of this case to the operation of the Privacy Act. In addition, the conflict that previously existed between the Ninth Circuit's restrictive approach to the statute, and the more expansive approach taken by other courts, has become even sharper in light of the D.C. Circuit's recent decision in *Dickson v. Office of Personnel Management*, 828 F.2d 32 (1987).

1. As a preliminary matter, it is essential to clarify what this case does and does not involve. Contrary to respondent's

repeated suggestions, this case does not concern the scope of the Privacy Act's access provision, 5 U.S.C. § 552a(d) (1). Petitioner was provided with a copy of the report about her before she even filed this lawsuit, and thus her complaint contains no request for access to that document. Accordingly, respondent's references to the Office of Management and Budget's analysis of the scope of the access provision, as well as the cases which have followed that analysis, have no bearing on this case. Resp. Br. at 8-9.

Rather, this case raises the question of whether individuals who already know that a particular document was used to make decisions adversely affecting their lives have any rights under the Privacy Act with respect to that document. Here, petitioner was informed by the Navy that the report at issue was prepared solely because her subordinate had filed a grievance against her, and that the report contained highly damaging evaluations of her supervisory abilities. In addition, despite the fact that the report was never placed in petitioner's own file, as respondent asserts is "typically" the case when an agency "make[s] a determination about the individual," Resp. Br. at 6 n.2, the report was *in fact* used by the Navy as the principal basis for demoting and officially reprimanding her. Moreover, as respondent now essentially concedes, *see* Resp. Br. at 2 n.1, the report was so erroneous that the adverse actions taken against petitioner on the basis of it were summarily reversed after petitioner filed a grievance alleging sex discrimination and retaliation.

Despite all of this, the Navy continues to maintain the report in its files, and there is nothing to prevent it from using the report again to make adverse decisions about plaintiff or from disseminating it to others. To conclude, as did the Ninth Circuit, that individuals have *no* Privacy Act rights in such circumstances, merely because the file in which the

agency chooses to place the offending document has another person's name on it, is to make a mockery of the Act. And this outcome cannot be justified on the ground that it is compelled by the language of the Privacy Act. Thus, while the access provision of the statute, which is not at issue here, speaks in terms of records that are "contained in the system [of records]," 5 U.S.C. § 552a(d) (1), the causes of action on which petitioner sued contain no such limiting language. Indeed, as petitioner demonstrated in her opening brief (at 7-8), and explains again below, the Ninth Circuit's dismissal of petitioner's claims is in direct conflict with other circuit court rulings on this issue.

2. While it is not evident from the government's brief in opposition, petitioner's complaint sought two basic forms of relief. Thus, she invoked section (g) (1) (C) of the Privacy Act, which creates a cause of action when erroneous records are used to make adverse decisions about individuals, *see Dickson, supra*, 828 F.2d at 37, as well as section (g) (4), which authorizes suits for actual damages resulting from violations of section (g) (1) (C). Based on these provisions, petitioner requested monetary relief for, among other things, the injury "intentionally" inflicted on her "professional reputation and career" by the Navy's misuse of the "grossly inaccurate and incomplete" report prepared about her. The Ninth Circuit held that petitioner could not obtain damages or any other relief because the Davis report was not placed in her own "system of records," but that approach is flatly contrary to the District of Columbia Circuit's analysis of the Privacy Act. Thus, while *Albright v. United States*, 631 F.2d 915 (1980), focused on another substantive provision of the Privacy Act, its principal reason for not restricting the coverage of the statute in the manner urged by respondent and adopted by the Ninth Circuit was that the particular provision at issue,

like those involved in this case, contains no requirement that the offending record be physically located in a system of records that is retrievable under the individual's name or other personal identifier. *Id.* at 918-20.

Moreover, shortly after the petition was filed in this case, the D.C. Circuit relied on a similar rationale in refusing to limit the scope of the statutory provisions that authorize damages when erroneous records are used to make adverse determinations about individuals. *See Dickson, supra.* Writing for a unanimous panel, Circuit Judge James Buckley stated that the damages provision "carves out no special exception or waiver selectively immunizing agencies from civil actions. Rather, in a straightforward manner, the Act establishes a predicate condition that records be maintained with requisite fairness." *Dickson, supra,* 828 F.2d at 37. Furthermore, the court stressed that, under the plain language of the provision, there is a "civil remedy action whenever *'any agency'* fails to maintain *'any record'* in such manner as to assure 'fairness in *any determination* relating' " to the individual. *Id.* at 39 (emphasis in original), *quoting* 5 U.S.C. § 552a(g) (1) (C). This reading of the provision, the court reasoned, also furthers the statute's goal of protecting "individuals from injury that can result from the bureaucratic habit of collecting and retaining information, however dated, prejudicial, or false." *Id.* at 38.

As is evident, the D.C. Circuit does not interpret section (g) (1) (C) of the Privacy Act as containing a requirement that the "dated, prejudicial, or false" records that form the basis of a damages action must actually be located in a "system of records" bearing the names of the persons who have been injured by them. Thus, under the D.C. Circuit's decisions in *Dickson* and *Albright,* individuals may seek damages for injuries caused by an agency's misuse of records, and their

claims cannot, as occurred here, be dismissed merely because of where the agency has opted to file the offending records. Hence, there is a clear conflict between the Ninth Circuit and the D.C. Circuit regarding the circumstances under which individuals may pursue damages under the Privacy Act.

3. The other relief sought by petitioner's complaint was amendment of the report about her, along with an injunction prohibiting the Navy from disseminating it in its present inaccurate and incomplete form. Like the Privacy Act's damages provision, the plain language of the provision concerning amendment of records does not include a requirement that the erroneous records be physically located in the file of the individual seeking relief. Thus, section (d) (2) of the statute states only that an individual may "request amendment of a record pertaining to him," and section (d) (3) permits an "individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal." Likewise, section (g) (1) (A), upon which petitioner expressly relied in her complaint, states that "[w]henever any agency. . . makes a determination under subsection (d) (3) not to amend an individual's record in accordance with his request," the individual may bring a civil action against the agency to obtain the amendment. Contrary to the Ninth Circuit's ruling, there is nothing in these provisions which limits their applicability to records that are physically found in an individual's own file.

This plain language reading of the Privacy Act's amendment provisions was expressly adopted by one of the cases cited by respondent, *Clarkson v. Internal Revenue Service*, 678 F.2d 1368 (11th Cir. 1982). Thus, while the Eleventh Circuit found that the statute's access provision, which is not at issue here, may be limited to records contained within an individual's own system of records, it also recognized that "sec-

tions (d) (2) and (d) (3). . . contain no such restrictions. . . [P]aragraph (d) (2) refers only to 'a record.' " *Id.* at 1376. In addition, the Eleventh Circuit emphatically rejected the notion—which was accepted by the Ninth Circuit and is again urged by respondent in this Court—that all of the Privacy Act's rights and remedies must be confined to records that can be obtained under the statute's access provision: "This argument, however, ignores not only the plain language of the statute, but also the reality that the Privacy Act is not the exclusive means for obtaining access to records maintained by an agency." *Id.* Thus, there is also a patent conflict between the Ninth Circuit and the Eleventh Circuit regarding the scope of the statute's amendment provision.

4. Finally, the government's attempt to distinguish this case from the Fifth Circuit's decision in *Chapman v. NASA*, 682 F.2d 526 (1982), is unsuccessful. Respondent suggests that *Chapman* is not in conflict with this case because it involved the question of *when* damaging documents must be placed in an individual's file and "[t]his case, by contrast, presents no question pertaining to the [Privacy Act's] timeliness requirement." Resp. Br. at 12. But as respondent concedes, the underlying assumption in *Chapman* was that records which are actually used by the government to make decisions harming an individual's employment status must, at some time, be placed in the individual's own file. Under that analysis, this case involves an even more egregious violation of the Privacy Act than that discerned by the Fifth Circuit, because the report at issue was used to demote and reprimand petitioner, yet it has *never* been placed in her file.

* * * *

In sum, the Ninth Circuit has adopted an extraordinarily narrow reading of the Privacy Act's scope which allows the idiosyncracies of an agency's filing system, or the whims of

those who use it, to control whether individuals may obtain damages for, and amendment of, erroneous records that have caused them injury. This reading is in conflict with the plain language of the Act, rulings of three courts of appeals, and the fundamental objectives underlying the statute. The decision below should, therefore, be reviewed by this Court.

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